BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Amendment of the Commission's Rules To Permit Flexible Service Offerings In the Commercial Mobile Radio Services	WT Docket No. 96-6

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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Pursuant to Sections 1.49, 1.415, and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. Sections 1.49, 1.415, and 1.419 (1996), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following comments in response to the initial pleadings filed by 18 other parties in response to the "First Report and Order and Further Notice of Proposed Rulemaking" ("FNPRM") adopted August 1, 1996 and released June 27, 1996, in the above-captioned proceeding. [1]

NARUC continues to oppose the establishment of a rebuttable presumption that services utilizing spectrum on a co-primary basis, which by definition are technically "fixed", are to be deemed Commercial Mobile Radio Services ("CMRS") merely because the spectrum utilized is allocated by the FCC for CMRS services.

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[1] In the Matter of Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, "First Report and Order and Further Notice of Proposed Rulemaking", WT Docket No. 96-6, 11 FCC Rcd 8965; 3 Comm. Reg. (P & F) 1190 (1996) - 61 Fed. Reg. 42721 (8/26/96)

Twenty-two parties filed comments in response to the FNPRM. All commentors opposed the establishment of a rebuttable presumption. However, in its stead, eighteen of those filing suggested a conclusive presumption that any fixed services provided via "CMRS" spectrum must be treated as mobile services under § 332. Most of those indicated that presumption should hold until such time as a State could demonstrate that the particular CMRS service was "a substitute for land line telephone local exchange service for a substantial portion of the communications within such state." The remaining commentors - State regulators and the National Telephone Cooperative Association - simply pointed out that the FCC lacks authority to shift the burden of proving jurisdiction to the State via a presumption.

Most participants in this series of proceedings no doubt anticipated the split in opinion. The motivations of the parties are readily apparent. NARUC's State Commission members, including the two that filed in this proceeding - the Public Service Commission of New York and the Public Utility Commission of the State of Ohio - are, like the FCC, composed of individuals whose jobs are to protect the public interest. Indeed, virtually every State commission in the country is required by statute to assure that telecommunications rates charged to consumers remain just and reasonable and that services required by the public convenience and necessity are provided and maintained. The 18 parties supporting a conclusive presumption have a fiduciary duty to a much smaller subset set of the Nation's citizens - their shareholders. While a company's business goals and fiduciary duty to its owners oft-times coincides with the public interest, this is not such an occasion.

To support their position, these 18 entities resurrect the same arguments already discussed in the FNPRM, while failing to address several fundamental and fatal flaws in their proffered approach presaged by earlier State comments in this proceeding.

(1) As the FCC in the FNPRM and in other dockets concedes (a) "fixed" wireless services exist, (b) provision in a particular band of spectrum does not impact the "fixed" vs. "mobile" classification, and (c) such "fixed" services are not subject to CMRS regulation under § 332, e.g., State authority over such services is controlled by §152(b).

Historically, the FCC has interpreted the definition of "mobile" services to include auxiliary, ancillary, secondary, or incidental fixed services. However, the FCC has always excluded services that are solely fixed in nature.[2] Specifically, the FCC has already determined that a mobile service station capable of transmitting while the platform is moving is included in the definition of mobile services. Platforms that cannot be moved while services are offered are not. Thus, satellite services provided to or from a transportable platform that cannot be used in a mobile mode are excluded from the definition of mobile services. Moreover, in defining Basic Exchange Telephone Radio Service ("BETRS"), the FCC agreed that "the substitution of a [fixed] radio loop for a wire loop in the provision of BETRS does not constitute mobile service...this service was intended to be an extension of intrastate basic exchange telephone service. Thus the [fixed] radio loop merely takes the place of wire or cable."[3]

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[2] See, In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1424-1425, at ¶ 38 (1994) ("Second Report and Order").

[3] Id. at ¶ 38, citing Basic Exchange Telecommunications Radio Service, Report and Order, 3 FCC Rcd 214, 217 (1988) {Emphasis Added}.

In this proceeding, the FCC has moved from "fixed" services that are merely "auxiliary, ancillary, secondary or incidental" to "co-primary" use of the CMRS spectrum to provide, inter alia, fixed local loop services technically and functionally indistinguishable from BETRs type services. However, at ¶ 52 of the FNPRM, the FCC basically reaffirms a "fixed" - "mobile" dichotomy by correctly noting that (1) just because a wireless service is offered in a particular band does not make it "CMRS" or "mobile" and (2) "fixed" services are not regulated under § 332. Specifically, in that paragraph, the FCC states "...we have determined that BETRS is a fixed service, rather than a mobile service, and therefore BETRS providers are not subject to CMRS regulation under section 332."

That reaffirmation is further buttressed by the FCC proposed approach outlined in ¶¶s 54 and 55 where the FCC discusses a number of potential indicators for when a service provided under CMRS spectrum would essentially qualify as "fixed". Although the FCC does not expressly reference § 152(b) authority, it is clear that State authority over BETRs and related "fixed" wireless services is clearly reserved by that provision. Specifically, that provision states: "[e]xcept as provided in...[§] 332..., nothing..shall be construed to apply or to give the Commission jurisdiction with respect to ...charges, classifications, practices services, facilities or regulations for or in connection with intrastate communications service by wire or radio of any carrier..."(Emphasis added.). 47 U.S.C. § 152(b) (1996).

(2) Given the clear reservation of State authority in § 152(b) over "wireless" services, and the possibility of indistinguishable BETRs/fixed local loop and other fixed service analogues being provided over CMRS spectrum, the FCC is not free to establish a rebuttable presumption against State "fixed service" jurisdiction - much less a conclusive one.

As noted in our initial comments, Congress was aware of BETRs services and the differing jurisdictional treatment accorded fixed and mobile wireless services. Section 610 of the 1996 legislation states "[t]his Act and the amendments made by this Act shall not be used to modify, impair or supersede or authorize the modification, impairment..[of]...Federal, State, or local law unless expressly so provided in such acts or amendment." {Emphasis added}[4] A related rule of statutory construction is the well established "presumption against finding preemption of State law in areas traditionally regulated by the States." See, California v. ARC America Corp., 490 U.S. 91, 101 (1989). As the very existence of this proceeding concedes, States have historically had regulatory authority over BETRs and similar fixed services. If Congress had intended, in § 332, to preempt such regulation, it would have expressly so stated. Cf. Hillsbourough County v. Automated Medical Laboratories, 471 U.S. 707, 175 (1985). Both the express text of § 152(b), which applies to all - both "fixed and mobile" - wireless service, and these related rules of statutory construction, require the scope of any FCC's prescriptive §332 authority which, by its own terms applies only to "mobile" services, to be narrowly construed.

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[4] See also Joint Explanatory Statement of the Committee of Conference ("Joint Explanatory Statement"), at 85 ("This provision prevents affected parties from asserting that the bill impliedly preempts other laws.")

State regulatory authority over wireless services - both mobile and fixed - is a given.[5] Carriers, not governmental regulatory authorities, carry the burden of proving they fall within a particular regulatory classification - "fixed" or "mobile".

To paraphrase § 601, preemption is not to be implied. NARUC respectfully submits the presumption posed in this NPRM is just the type of "implication" prohibited by that section. Moreover, that proposal to shift the burden of proof to State commissions flies in the face of long established canons of administrative law.

Even if the presumption did not involve the jurisdictional prerogatives of the individual sovereign States, as proposed, it fails to meet even the minimal requirements required for presumptions established between co-equal litigants. Specifically, in such cases, the validity of a presumption established by an agency depends, as a general rule, upon a rational nexus between the proven facts and the presumed facts.

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[5] Notwithstanding numerous suggestions by commentors to the contrary, State jurisdiction over intrastate operations of even "mobile" services remains virtually intact. Only States have the authority to deal with intrastate rates, albeit only after convincing the FCC under § 332 that consumers are being injured by a failure of the competitive market to control rate levels. Moreover, States retain broad jurisdiction to address "other terms and conditions" of mobile service. As the legislative history notes: "It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions," the committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues..; transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or other such matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions." "1993 U.S. Code Cong. and Adm. News, p. 558, House Report No. 103-111, 103rd Cong., 1st Sess. at 261-2 (1993).

As a review of the comments and the record in this proceeding demonstrates, there is no clear delineation of all the types of technically "fixed" services that could fall under the "CMRS" rubric if either a rebuttable or conclusive presumption were adopted. Indeed, the FNPRM concedes the proposed services could well be virtually identical to BETRs and other non-§ 332 governed "fixed services".[6] Hence, there is no basis for assuming in any particular case, much less the majority of cases, that a technically "fixed" station to "fixed" station "co-primary" use of CMRS spectrum would in most instances actually qualify as "mobile." As noted in United Scenic Artists, Local 829 v. N.L.R.B., 762 F 2d 1027 at 1034 (1985) - an agency is not free - when dealing with co-equal litigants - to ignore statutory language by creating a presumption on the grounds of policy to avoid the necessity for finding that which the legislature requires to be found. A fortiori, the FCC must lack such authority in adjudications involving (1) regulated utilities and States charged with oversight of the intrastate operations of that entity whether the service involved is ultimately labeled "CMRS" or "fixed" and (2) a Statute that expressly reserves State authority and includes specific proscriptions against implied preemption.

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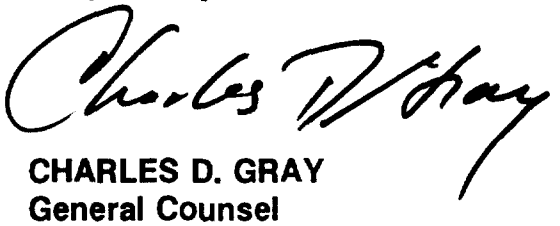
[6] The record in this proceeding does not demonstrate any credible distinction between most of the proposed "fixed" uses, particularly the so-called "fixed local loop", and existing "fixed" services like BETRs. See, e.g., the FNPRM at ¶¶s 10 & 11 where the FCC notes it was seeking in this proceeding to give "CMRS providers more flexibility to offer fixed services, including: (1) adopting a rule that would expressly allow CMRS providers to offer "fixed wireless local loop," (2) permitting CMRS providers to offer wireless local loop and other defined fixed services, or (3) allowing CMRS providers to offer any form of fixed service without restriction." All three suggestions include services indistinguishable from existing "fixed" offerings.

VI. CONCLUSION

NARUC is concerned that the FCC's proposal could impair states' ability to ensure equal protection of consumers of functionally equivalent services. Because of particular local circumstances, it is important that states be allowed to determine the appropriate regulation of fixed wireless services. Accordingly, NARUC urges the FCC to ensure the establishment of federal policies regarding wireless services that will not result in unequal regulatory treatment of new local exchange service providers. NARUC also urges the FCC not to establish a rebuttable presumption that any wireless service, including fixed wireless service, provided under a CMRS provider's license comes within the definition of CMRS and consequently should be regulated as CMRS.

Respectfully submitted,



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December 20, 1996

CERTIFICATE OF SERVICE

I, JAMES BRADFORD RAMSAY, certify that I have served a copy of the foregoing on all the parties on the attached service list by 1st class mail, postage prepaid, this 23rd day of December, 1996.

James Bradford Ramsay
Assistant General Counsel